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SUPREME COURT, U.S.

No. 99-612

IN THE

Supreme Court of the United States

WYSONG LASER COMPANY, INCORPORATED
and WYSONG AND MILES COMPANY,

Petitioners,

v.

VIDIMOS, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in refusing, based on the law of the case doctrine, to reconsider rulings in a prior appeal that the distributorship agreement is governed by Michigan law and does not exclude consequential damages.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent states that it has no parent corporation and that no publicly held company holds 10% or more of its shares.

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Fountain v. Filson, 366 U.S. 681 (1949) 5, 6

STATEMENT OF THE CASE

A. Summary of Procedural History

We accept this portion of Petitioner's Brief, but note that Respondent abandoned its promissory estoppel claim prior to trial. The only issue presented to the jury was the claim that Petitioner breached its obligations under the distributorship agreement.

B. Factual Background

We accept Petitioner's summary of facts except for the following:

1. The Petition says that the term "warranty in Agreement" in Exhibit C of the distributorship agreement refers to paragraph 9(a), and that the exclusion of consequential damages in Paragraph 9(a) applied to customers like Vidimos. The Seventh Circuit rejected this interpretation in the 1996 opinion. Moreover, as noted in its brief, on this point Petitioner relies on the testimony of L.C. Lackey. The Petition says that Lackey's testimony was erroneously excluded from evidence. However, Petitioner did not appeal those evidentiary rulings.

2. The Petition also says that the issue of consequential damages had not been presented to the Circuit Court prior to its 1996 decision. However, the claim that the distributorship agreement excluded liability for consequential damages was presented in Wysong's first motion for summary judgment. The District Court accepted that argument and relied on it as an alternative grounds for the summary judgment rendered on December 2, 1993.

3. The Petition says that Laser Lab failed to disclose the history of the laser cutting system to Wysong before the distributorship agreement was signed. This was a disputed factual issue. Respondent presented evidence that an officer of Wysong Laser had actual knowledge prior to the signing of the distributorship agreement.

4. The Petition says that Wysong was not permitted to contest the scope of the warranty obligations that Wysong agreed to assume. However, Wysong was allowed to submit evidence, and given a jury instruction, on its contention that its warranty obligations to Vidimo did not include the laser subassembly.

REASONS FOR DENYING THE WRIT

This is a case in which the critical legal issues turned on the interpretation of a written contract, the distributorship agreement. To reach those issues it was necessary to first decide what law should be applied. After the district court dealt with those issues, in 1996 the Circuit Court decided that Michigan law applied, that Vidimos could sue Wysong as a third party beneficiary, and that the distributorship agreement did not exclude consequential damages. Several other legal issues were decided by the District Court's 1998 order denying Wysong's second motion for summary judgement.

The case then proceeded to trial on factual issues, such as alleged misuse of the laser equipment, alleged warranty exclusions, and economic damages. A jury trial resulted in judgement for Vidimos, and Wysong commenced the second appeal. The issues raised in the second appeal amounted to a request for the Circuit Court to reopen issues decided in

its 1996 opinion. Not surprisingly, the Circuit Court declined in a very short opinion based on law of the case principles.

The Petition should be denied because the Circuit Court's enforcement of the law of the case doctrine was nothing more than the routine application of settled law. The law of the case doctrine requires that, when a Court has decided upon a rule of law, that decision should, except in extraordinary circumstances, continue to be applied in subsequent stages of the same case.

> A court has the power to revisit prior decisions of its own or a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice."

Arizona v. California, 460 U.S. 605, 618 n.8 (1983). In this case, the Circuit Court held, in its 1996 Opinion, that under Michigan law the distributorship agreement does not exclude liability for consequential damages. The Circuit Court's refusal to reconsider those issues in its 1999 opinion was based on a conventional application of the law of the case doctrine. It does not require review by this Court.

The Circuit Court's 1996 rulings were not *obititer dictum*, as claimed by the Petition. On the contrary, the 1996 resolution of the issue of consequential damages was necessary to the decision to reverse summary judgment and remand for trial. Wysong's argument, that the distributorship agreement excludes liability for consequential damages to customers like Vidimos, was presented in its first motion

for summary judgment. It was accepted by the District Court as an alternative grounds for the 1993 summary judgment. As explained by Chief Judge Posner in his 1996 Opinion, the Circuit Court was required to address the issue at that time, because "Wysong argues that the contract precluded the recovery of consequential damages, and as those are the only damages that Vidimos seeks there is little point in prolonging this litigation if Wysong is right." The holding that Vidimos can recover consequential damages was therefore necessary for the resolution of the first appeal, and properly considered law of the case.

The Circuit Court's refusal to revisit its 1996 choice of law decision was, if anything, more clearly correct than its disposition of the consequential damages issue. In his 1996 Opinion, Chief Judge Posner began his analysis by noting that the distributorship agreement "provides that Michigan law shall govern any dispute arising out of it". The Circuit Court had no reason to reconsider that decision in the second appeal.

First, Wysong's attorneys had agreed to the application of Michigan law. This was neither an oversight nor a blunder, because the distributorship agreement provided that "this agreement shall be interpreted and enforced under the laws of . . . the State of Michigan". Wysong did not object when the District Court held, in its 1993 summary judgment, that Michigan law must be applied. On the contrary, in the first appeal, Wysong's brief conceded that Michigan law governs plaintiff's assertion of rights to enforce the distributorship agreement. It changes nothing for Wysong to argue that the 1996 Opinion did not use the words "prejudgment interest". Vidimos' claim for prejudgment interest was a disputed issue arising out of the distributorship agreement. That claim is

therefore governed by both the contractual choice of law provision, and the 1996 choice of law ruling.

Secondly, Wysong failed to address the application of the law of the case doctrine to the choice of law issue in its brief to the Seventh Circuit in the second appeal. Chief Judge Posner was therefore correct in his observation that:

> As Wysong does not so much as mention the law of the case doctrine in connection of the issue of Vidimos's entitlement to prejudgment interest, even in its reply Brief- Vidimos having emphatically invoked its doctrine in its Appellee's Brief- Wysong has forfeited any claim to an exception to the doctrine.

179 F.3d 1965 (7th Cir. 1999).

The most important point is that the Petition does not claim that there is any conflict among the circuits, and the decision below does not conflict with any applicable decision of this Court.

The Petition cites *Fountain v. Filson*, 366 U.S. 681 (1949), but that decision has nothing to do with the present case. In *Fountain*, the sole basis for summary judgment for the defendant was the claim that New Jersey law would not permit the application of a resulting trust. In *Fountain*, it was held that the Court of Appeals erred in remanding with instructions to enter judgment for the plaintiff on an issue on which the opposing party had no opportunity to present a defense. In the present case, it was Wysong which first raised the issue of whether the distributorship agreement excluded liability for consequential damages. Wysong had an

opportunity to and did present its position in the district court on that issue. Wysong then had additional opportunities to address the consequential damages issue first in its brief, and later in oral argument before the Seventh Circuit. Wysong is mistaken in its belief that this case is similar to *Fountain v. Felton*, where the Circuit Court reversed a summary judgement and ordered the entry of judgement *sue sponte* for the nonmoving party on an issue the movant had no opportunity to meet.

It would only have been appropriate for the Seventh Circuit to reconsider its 1996 opinion if it had been "clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. 605, 618 (1983). On the contrary, the 1996 opinion was correctly decided. As noted by Chief Judge Posner, the problem with Wysong's argument on consequential damages is that paragraph 9(a) only describes, and only attempts to limit, the manufacturer's (Laser Labs') duties to the distributor (Wysong). It says nothing about the distributor's duties and liabilities to customers like Vidimos. Under paragraph 4(g), Wysong assumed a duty to perform the manufacturer's service obligations under warranties.

If the parties had intended Exhibit C to refer to Section 9(a), or to have it exclude consequential damages to customers like Vidimos, it would have been easy enough to say so. Exhibit C contains no reference to Section 9(a), nor does it contain any disclaimers or limitations of warranties.

This case does not require the exercise of this Court's extraordinary and discretionary jurisdiction. It is nothing other than a perfectly ordinary breach of contract case, of interest only to the closely held corporations who happen to be parties. The legal issues on which the case turned were

resolved by the routine judicial task of interpreting the particular language of a specific written contract. The Circuit court gave full consideration to the issues in 1996 and decided them correctly. Although the Circuit Court had the power to revisit its prior decision in 1999, it was not required to do so. This case has already consumed its share of judicial resources. The law of the case doctrine serves the useful purpose of promoting finality and efficiency in the judicial process, by "protecting against the agitation of settled issues." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. No. 800, 816 (1988). It would undercut those policies to grant the Petition.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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